IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN W. GREEL,

Petitioner,

v.

MICHAEL MARTEL, Warden,

Respondent.
_____/

No. 08-04474 CW

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Stephen W. Greel is a state prisoner incarcerated at Mule Creek State Prison. On September 24, 2008, he filed his original pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a conviction and sentence imposed by the Contra Costa County Superior Court. Petitioner claims that there was insufficient evidence to support his conviction for kidnapping to commit rape, and that the introduction of certain evidence inflamed the passions of the jury, thus depriving him of his constitutional right to a fair trial. On the same day, Petitioner filed a motion for appointment of counsel, which the Court granted on February 26, 2009. On July 21, 2009, Respondent filed an answer. Petitioner, represented by counsel, timely filed a traverse. Having considered all of the papers filed by the

parties, the Court DENIES the petition.

PROCEDURAL BACKGROUND

On April 29, 2004, the district attorney filed an information charging Petitioner with attempted murder (Count One; Cal. Penal Code, §§ 187, 664);[1] kidnapping to commit rape (Count Two; § 209(b)), assault with a firearm (Count Three; § 245(a)(2)); assault to commit rape (Count Four; § 220); and assault with a stun gun (Count Five; § 244.5(b)). The information also alleged sentencing enhancements for inflicting great bodily injury within the meaning of section 12022.7 as to Counts One and Three, and for personal discharge of a firearm causing great bodily injury within the meaning of section 12022.53(d), as to Counts One, Two, and Four.

On August 2, 2005, a jury found Petitioner guilty on all counts. The jury also found the alleged sentencing enhancements true, except for the firearm discharge as to Count Four, assault with intent to rape.

On March 2, 2005, the trial court denied probation and imposed an aggregate sentence of thirty-four years and eight months to life.[2] Petitioner timely appealed his convictions. The California court of appeal, in an unpublished opinion, reversed Petitioner's conviction for assault with a stun gun for insufficiency of

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[1]All further statutory references are to the California Penal Code, unless otherwise noted.

[2]Both the parties contend the sentence was forty-one years to life, but the California court of appeal found the sentencing documents to support a thirty-four year and eight month sentence. Resp's Ex. 2, at 4 fn. 3.

evidence, but otherwise affirmed the judgment. Resp's Ex. 2; People v. Greel, No. A111307 (Cal. App. April 25, 2007). Petitioner filed a petition for review with the California Supreme Court, which was summarily denied on July 11, 2007.

FACTUAL BACKGROUND

The factual background of Petitioner's conviction is summarized based on the court of appeal opinion, unless otherwise stated.

On April 26, 2004, Petitioner, nineteen years old at the time, picked up a woman who was hitchhiking. When she tried to exit the vehicle, Petitioner grabbed a stun gun and attempted to incapacitate the woman with it. The stun gun had no effect, and the woman escaped from the car by jumping through the passenger-side window, because the inside passenger-side door handle was broken. At the time, the vehicle was moving at about five miles per hour, and had just crossed a bridge. The woman sustained minor injuries jumping from the car, but was able to stand up and run. As the woman ran away, Petitioner shot eight rounds from a .22 caliber handgun at her from a distance of approximately twenty feet. One bullet hit the woman, causing serious injury. As Petitioner tried to throw the gun off the bridge, the barrel broke off in his hand and fell to the ground, and the remainder of the gun landed on a sand bar below. Petitioner then fled the scene.

Later that day, after consulting with his mother, Petitioner turned himself in at the Garberville sheriff's office. Resp's Ex. 5, 1 Reporter's Transcript (RT) at 157. A consensual search of Petitioner's car revealed a stun gun behind the passenger seat, and

a passenger-side door with no handle. Resp's Ex. 5, 2 RT at 277. Petitioner waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966). He told Detective Dennis Young, who arrived at the station to interview him, that he had picked up a hitchhiker, attempted to use a stun gun on her, and shot her when she tried to escape. Resp's Ex. 5, 1 RT at 250, 254-255. Petitioner said he planned to rape the woman but then he wavered after speaking with her about her family. Pet'r's Ex. A, at 20-21. He said he was glad she had gotten away because he probably would have raped her and maybe would have even killed her. Pet'r's Ex. A, at 31.

At trial, two types of evidence were introduced over Petitioner's objections. First, copies of two pornographic stories, recovered from Petitioner's bedroom and apparently downloaded from the internet and printed out, were introduced to demonstrate Petitioner's intent to rape and kill the woman. The first story described the rape and murder of an eight-year-old girl, and the second a son's rape of his mother. The prosecutor made reference to the stories at least five times in his closing argument to the jurors, and urged them to examine the stories for themselves. Resp's Ex. 5, 2 RT at 431-432, 440, 446, 473-474.

The second type of evidence introduced over Petitioner's objection was testimony from a sheriff's sergeant. The sheriff's sergeant testified that, when Petitioner was fifteen years old, she investigated a complaint that he had molested his five-year-old niece. At that time, Petitioner admitted to engaging in sodomy, oral copulation, fondling, and masturbation in front of the child. Petitioner also admitted to having molested his niece in his

statement to Detective Young, which was played for the jury. Resp's Ex. 5, 2 RT at 318.

In his closing argument to the jury, the prosecutor conceded that Count Five, assault with a stun gun (§ 244.5(b)), was unsupported by the evidence because it could not be shown that the stun gun was capable of incapacitating a person, a required element of the offense. Resp's Ex. 5, RT at 430. Accordingly, the prosecutor urged the jury to convict instead on the lesser included offense of assault (§ 240). Resp's Ex. 5, RT at 479.

DISCUSSION

I. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal writ of habeas corpus may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claims:

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." William v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the 'unreasonable

application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the [Supreme] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings of the Supreme Court as of the time of the relevant state court decision. Id. at 412.

If the state court considered only state law, the federal court must ask whether state law, as explained by the state court, is "contrary to" clearly established governing federal law. Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2001). If the state court, relying on state law, correctly identified the governing federal legal rules, the federal court must ask whether the state court applied them unreasonably to the facts. Id. at 1232.

If constitutional error is found, habeas relief is warranted only if the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" Penry v. Johnson, 532 U.S. 782, 795 (2001)(quoting Brecht v. Abrahamson, 507 U.S. 619, 638 (1993)).

In determining whether the state court's decision is contrary to, or involved an unreasonable application of, clearly established federal law, a federal court looks to the decision of the highest state court to address the merits of a petitioner's claim in a reasoned decision. Lajoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000). Here, the highest state court to issue a reasoned opinion is the California court of appeal.

II. Sufficiency of the Evidence of Kidnapping with Intent to Rape

Petitioner asserts that there is insufficient evidence to support his conviction for kidnapping with intent to rape in violation of section 209(b) because his forced movement of the victim was merely incidental, and that his conviction thereby violates his due process rights under the federal Constitution.

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). A state prisoner who alleges that the evidence in support of his conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt therefore states a constitutional claim, which, if proven, entitles him to federal habeas relief. See Jackson v. Virginia, 443 U.S. 307, 321-324 (1979).

The kidnapping with intent to commit rape statute, section 209(b), provides:

> (1) Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy, or any violation of Section 254.1, 288, or 289, shall be punished by imprisonment in the state prison for life with the possibility of parole.
> (2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.

In determining whether a forced movement was merely incidental, the jury must consider such factors as "whether the movement decreases the likelihood of detection, increases the danger inherent in a

victim's foreseeable attempts to escape, or enhances the attacker's opportunity to commit additional crimes." People v. Dominguez, 39 Cal. 4th 1141, 1152 (2006).

In reviewing claims of insufficient evidence, California courts use the Jackson standard. See People v. Cuevas, 12 Cal. 4th 252, 260-262 (1995); People v. Johnson, 26 Cal. 3d 557, 578 (1980).

In the California court of appeal, Petitioner argued that no rational trier of fact could have found him guilty of kidnapping with intent to rape because he moved the victim only a short distance, several hundred feet across a bridge, before she escaped from the car. Therefore, he argued that the movement was merely incidental to the intended rape, and did not either decrease the risk of detection or increase the risk of harm to the victim. The court rejected this argument. Resp's Ex 2 at 8-9. It noted that Petitioner could have raped his victim at any time; movement across the bridge was not required, and thus a reasonable jury could have concluded that the forced movement, while brief, was undertaken for a non-incidental purpose. Id. at 7.

Furthermore, the court acknowledged that there was no evidence that there was a lesser risk of detection at the far end of the bridge, where the forced movement ended, but noted that "transporting a victim by car '[gives] rise to dangers, not inherent in [an underlying crime], that an auto accident might occur or that the victim might attempt to escape from the moving car or be pushed therefrom . . .' Id. at 8 (quoting In Re Earley, 14 Cal. 3d 122, 132 (1975)). The court explained that the victim did attempt to escape in this case, jumping from the moving

vehicle. Id. Although her injuries were slight, the court reasoned that even at only five miles an hour, she could have easily been seriously injured. Id. That she was not seriously injured did not alter the fact that the forced movement created the risk that she might have been. Id.

Petitioner counters that jumping from a vehicle moving at five miles an hour is no more dangerous than jumping from a stationary location, and therefore that no reasonable person could convict him of kidnapping with intent to rape based on his forced movement of the victim. The court of appeal's rejection of this argument is not contrary to or an unreasonable application of Supreme Court precedent. A reasonable jury could have found that Petitioner's forced movement of the victim, while not far in distance, was not merely incidental because it substantially increased the risk of injury to the victim. Accordingly, habeas relief on this claim is unwarranted.

III. Admission of Prejudicial Evidence

Petitioner asserts that the introduction of pornographic stories in his possession, and evidence of his prior sexual misconduct, was so prejudicial as to render his trial fundamentally unfair in violation of his federal due process rights.

The admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process. Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999). The Supreme Court "has not yet made a clear ruling that admission of irrelevant or

overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (finding that trial court's admission of irrelevant pornographic materials was "fundamentally unfair" under Ninth Circuit precedent but not contrary to, or an unreasonable application of, clearly established federal law).

Failure to comply with state rules of evidence is neither a necessary nor a sufficient basis for granting federal habeas relief on due process grounds. Henry, 197 F.3d at 1031; Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995). Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. Jammal, 926 F.2d at 920.

A. Pornographic Stories

Petitioner asserts that the trial court improperly weighed the probative value and prejudicial effect of the violent pornographic stories in Petitioner's possession that it admitted into evidence to show intent to kill and rape the victim.

The court of appeal held that the stories were properly admitted, because they were relevant and the likely prejudicial effect of their admission was "not great." Resp's Ex. 2, at 11. The court noted that, although the stories themselves were shocking and disturbing, there was "no contention that the defendant was the author of the stories and was responsible for their content," and

thus the jury was unlikely to be unduly prejudiced by viewing them. Id. On that basis, the court held that the trial court's admission of the stories was not an abuse of discretion. Id. The court also noted that, even if the stories were improperly admitted, the error would have been harmless, given the extensive evidence of Petitioner's guilt: he confessed to the crime to both his mother and the police, his account matched that of the victim, and physical evidence recovered from the scene was consistent with Petitioner's confession. Id.

Because there is no clear Supreme Court precedent holding that admission of prejudicial and irrelevant evidence can be an appropriate basis for habeas relief, Petitioner would not be entitled to habeas relief on this ground even if he could show that admission of the stories unfairly biased the jury against him. See Holley v. Yarborough,568 F.3d 1091 at 1101 (holding that even though admission of irrelevant prejudicial evidence was grounds for reversal of petitioner's conviction under Ninth Circuit case law, the lack of clear Supreme Court precedent meant that habeas relief was inappropriate on that ground).

Furthermore, even under the Ninth Circuit's Jammal standard, the state court was not unreasonable in finding that admission of the stories did not render Petitioner's trial fundamentally unfair. The evidence was introduced for the purpose of corroborating Petitioner's self-admitted fantasies about killing and raping a woman and to show his intent to act on those fantasies. See Pet'r's Ex. A, 20-21, 31. Although the evidence arguably had little probative value because of Petitioner's own admissions to

the same effect, it was offered to counter the defense's suggestion at trial that Petitioner's admissions had been bravado on the part of a person with low self-esteem, and that there was no sexual element to the crimes committed. Resp's Ex 5, 1 RT 129, 2 RT 459. The jury could have permissibly inferred from this evidence that Petitioner's admissions were not simply bravado and that his interest in raping and killing a woman was real. The state court was not unreasonable in finding that, because there was a legitimate inference the jury could have drawn from the evidence, its introduction did not result in a fundamentally unfair trial. See Jammal, 926 F.2d at 920. Therefore, the court of appeal's determination was not contrary to or an unreasonable application of Supreme Court precedent, and Petitioner is not entitled to habeas relief on this ground.

B. Evidence of Petitioner's Past Sexual Misconduct

Petitioner argues that introduction of evidence that he had molested his five year old niece four years prior to the charged conduct was also so prejudicial as to render his trial fundamentally unfair.

In general, character evidence, including specific instances of past conduct, is inadmissible under California law when introduced to show a criminal defendant acted in conformity with his or her character. See Cal. Evid. Code. § 1101. In the case of prosecutions for sexual crimes, however, California Evidence Code section 1108 removes this prohibition in regard to evidence of other sex offenses committed by the defendant. Cal. Evid. Code. § 1108. Accordingly, admission of this sort of evidence is limited

only by California Evidence Code section 352's balancing test, which weighs probative value against prejudicial effect. Cal. Evid. Code. § 352; see People v. Falsetta, 21 Cal. 4th 903, 916 (1999) (holding that, in the case of evidence of prior sexual conduct, in deciding whether to admit the evidence the trial court must weigh such factors as the nature, relevance, degree of certainty and remoteness of the offense, the likelihood of confusing or distracting the jury, the likely prejudicial effect, and the possibility of less prejudicial alternatives).

The court of appeal held that the introduction of evidence of Petitioner's past sexual misconduct presented "a close call" under California Evidence Code section 352, but it did not find the admission an abuse of discretion. Resp's Ex. 2, at 13. The court also held that, even if the evidence was improperly admitted, any error was harmless, given the strength of the case against Petitioner. Id.

As mentioned above, the lack of clear Supreme Court precedent on this issue forecloses relief to Petitioner even if the admission did render his trial fundamentally unfair under Ninth Circuit precedent. See Holley, 568 F.3d at 1101.

Pursuant to Federal Rules of Evidence 413, 414, and 415, evidence of prior sexual misconduct is explicitly recognized as admissible in sex offense cases, subject to considerations of prejudice and probative value. United States v. LeMay, 260 F.3d 1018, 1026-27 (9th Cir. 2001). Admission of such evidence in federal court is subject to the balancing test of Federal Rule of Evidence 403, but the rule recognizes that there is legitimate

probative value to be balanced against prejudicial effect. The court of appeal was not unreasonable in finding that the probative value of the evidence outweighed its prejudicial effect, and that any error was harmless because the case against Petitioner was strong. Even if the court did err, the strong evidence presented by the prosecution, including the matching confession, testimony of the victim and physical evidence, ensured that the evidence of sexual misconduct had no "substantial and injurious effect or influence in determining the jury's verdict." See Brecht, 507 U.S. at 638. The California court of appeal's rejection of Petitioner's arguments was not contrary to or an unreasonable application of Supreme Court authority, and he is not entitled to habeas relief on this ground.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The Court will issue a certificate of appealability for this case should Petitioner wish to pursue an appeal. See Rule 11(a) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on certificate of appealability in same order that denies petition). A certificate of appealability should be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must indicate which issue or issues satisfy the showing required by § 2253(c)(2). 28 U.S.C. § 2253(c)(3). The Court finds that Petitioner has made a sufficient showing of the denial of a constitutional right on his claims based on the

admission of prejudicial evidence. Petitioner has not made a showing sufficient to justify a certificate of appealability on his claim based on the insufficiency of the evidence supporting his kidnapping conviction. The Clerk of the Court shall enter judgment, terminate all pending motions, and close the file.

IT IS SO ORDERED.

Dated: July 23, 2010

CLAUDIA WILKEN
United States District Judge